

Short Notes on:

BREACH OF CONTRACT: GENERAL REMEDIES

Introduction

When entering into an agreement, a general requirement is that the contracting parties act in good faith. Therefore, the last thing that contracting parties want to focus on is the possibility of the agreement falling through or one of the contracting parties not performing in terms of the contract; in other words committing a breach.

Be that as it may, it is important that contracting parties are able to not only identify the forms of breach but also identify and understand the remedies available to them should a party to an agreement commit a contractual breach.

Overview

In South Africa there are generally three forms of remedies available when a contracting party has breached an agreement. The applicability of each remedy will depend on amongst others, the type of breach, the extent of the breach and in certain instances, specific contractual terms which have been agreed upon by the parties in respect of breach.

The three general remedies for breach are the following:

Specific Performance- Specific performance is a remedy which calls upon the breaching party to perform in terms of its contractual obligations. There are number of considerations when attempting to utilize this remedy which include: whether or not it is possible for the breaching party to perform its contractual obligations, whether claiming for damages would be a more appropriate remedy in response to the breach and whether the contractual relationship between the parties can still be rescued, amongst others.

Specific performance as a remedy for breach is ordinarily not available for service related or employment contracts.¹

¹ Lexisnexis (2021), “*Contractual Breach Damages And Remedies – Overview*”, www.lexisnexis.com Accessed on: 27 April 2021.

Contractual Damages- The innocent party to a contract may claim contractual damages from the breaching party in the event of breach. The innocent party must be able to prove that a contract existed between the parties, that the other party breached the contract and that it has suffered damages as a result of such breach.² The innocent party must be able to prove or quantify the damages it has incurred as a result of the breach.

Cancellation of the Contract- Cancellation of a contract in the event of breach is an extremely drastic remedy. It may be utilized when a breach is sufficiently serious in nature or where the parties have agreed to a right to cancel in the contract. It is a difficult remedy to implement and is often the last resort in instances of breach.

As indicated previously, contracts may contain provisions for instances of breach. Ordinarily these provisions will dictate certain chosen remedies in respect of breach and may also indicate a specific process which needs to be followed if a breach occurs.

Often these clauses will provide arrangements for notice and the opportunity for the breaching party to remedy their breach. If a contract does not provide for a breach clause then common law principles may apply.

However, it is important that should a contract make provision for a specific process in respect of breach, that such process is followed by the innocent party.

Conclusion

Dealing with breach of contract is never desired when entering into an agreement. Disputes in respect of breach can get messy and convoluted especially when there are complicated factual disputes.

It is important to obtain legal assistance both in the instances of entering into a contractual arrangement as well as when a party is of the opinion that a breach has occurred. This may guard against insufficient protection in instances of breach and also ensure that proper processes are followed when an innocent party is seeking to enforce the remedies available to it.

² J Ripley-Evans & F N Del Valle (2020), “*The Global Damages Review: South Africa*” *The Law Reviews*, www.lawreviews.co.uk Accessed on: 27 April 2021.

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